### UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD Washington, D.C.

SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP AND KAISER FOUNDATION HOSPITALS,

Case 21-CA-39296

and

NATIONAL UNION OF HEALTHCARE WORKERS

#### EMPLOYERS' RESPONSE TO THE ACTING GENERAL COUNSEL'S LIMITED EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

MICHAEL R. LINDSAY mlindsay@nixonpeabody.com
NIXON PEABODY LLP
Gas Company Tower, 555 West Fifth St., 46th Floor
Los Angeles, California 90013-1010
Telephone: (213) 629-6000
Fax: (213) 629-6001

CHRISTOPHER D. BAKER cbaker@nixonpeabody.com
SETH NEULIGHT
sneulight@nixonpeabody.com
NIXON PEABODY LLP
One Embarcadero Center, 18th Floor
San Francisco, CA 94111-3600
Telephone: (415) 984-8200
Facsimile: (415) 984-8300

Attorneys for the Employers SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP AND KAISER FOUNDATION HOSPITALS

, t		
	  -	
	į	
	: ;	
	,	

The Employers, Southern California Permanente Medical Group and Kaiser Foundation Hospitals, (the "Employers") file this Response to the Acting General Counsel's Limited Exception to the Administrative Law Judge's Decision.

### I. The Employers Offered to Stipulate to Resolve the Issues Presented by the Acting General Counsel's Exception.

Prior to the time for the filing of exceptions, counsel for the Employers notified counsel for the Acting General Counsel that the Employers had decided not to file exceptions to the decision of the Administrative Law Judge ("ALJ"). Further, upon receipt of the Acting General Counsel's Exceptions, the Employers proposed a stipulation to modify the Decision, the 'Order and the Notice as requested in the Acting General Counsel's Exception in order to expedite the resolution of this matter. Counsel for the Charging Party agreed to the proposed stipulation. Counsel for the Acting General Counsel rejected the stipulation, "The Region is not open to stipulating to an amendment of the Order, Decision and Notice" and stating that the Employers should file a response to the Acting General Counsel's Exception.

Accordingly, the Employers are filing this response. As explained briefly below, the Employers were disappointed with the ALJ's decision and believe it to be erroneous.

Nevertheless, the Employers have elected not to file exceptions or cross-exceptions to his decision. They want to resolve these matters as promptly as possible. As a part of their efforts to resolve these matters promptly, the Employers have now fully complied with the provisions of the Preliminary Injunction issued by the District Court in the related action under Section 10(j). Furthermore, while counsel for the Acting General Counsel has refused to agree to a stipulation to correct the ALJ's decision as to the unit definition for the Healthcare Professionals Unit, the

13343081.1 - 2 -

Employers remain fully willing to enter such a stipulation if that would finalize this matter as rapidly as possible. Should it not be, the Employers request that the National Labor Relations Board modify the ALJ's Decision, Order and Notice in accordance with the Acting General Counsel's request and resolve this matter as quickly as possible.

## II. The ALJ Did Not Understand the Nuances of the Partnership Between the Coalition of Kaiser Unions and the Employers.

The issues presented to the ALJ arise out of something unique in annals of United States labor law – a partnership agreement between the Employers and a coalition of some of the unions that represent some of the employees of those Employers. This arrangement has developed over the past 15 years with considerable work and effort by both the Employers and the various unions that are part of the Coalition of Kaiser Unions, (the "Coalition").. In their agreements, the Employers and the unions in the Coalition have developed a number of carefully crafted provisions, with each trading some of their individual autonomy for other benefits in the context of the Labor Management Partnership. While there are some 40 International and Local Unions in the Coalition, a significant number of the unions representing other of the Employers' employees have decided not to participate in the Coalition with the related benefits and trade-offs.

The ALJ's Decision ignored this arrangement. The ALJ did so based on his reading of a case arising under section 8(a)(2) of the Act and held that when employees select a representative outside of the coalition, they are somehow entitled to all of the benefits of the Partnership, pending a new contract or impasse, but none of the responsibilities in order to maintain a fanciful status quo during bargaining with a newly selected union.

13343081.1 - 3 -

1			
	,		
ı			
	ļ		
	:		
	ļ		

For example the Employers have a single written policy that applies uniformly to all of their employees concerning education benefits. That policy expressly provides that the Employers do not pay for education expenses related to compliance with continuing education requirements for any of their employees, except for only those employees actually represented by a union that is a member of the Coalition. Here after the employees voted to be represented by a union that was not a member of the Coalition, the Employers' written policy that applied after the election was the exact same policy that existed before the election. Nevertheless, and despite the express language in the policy limiting participation in this benefit to employees represented by a union that was part of the Coalition, the ALJ held the written policy's express language did not represent the "status quo," and that the Employers should have granted the enhanced benefits contrary to the express language of the unchanged policy!

The potential impact of the ALJ's decision is considerable. His determination that the give and take that led to the Partnership and the balancing that underlies the Partnership as well as its associated agreements are completely meaningless in light of his interpretation of section 8(a)(5) obligations undermines the Partnership. If his reasoning were to be applied in every case, the employees will get all the benefits if they chose to be represented by a union outside the Coalition, and their new union will have none of the obligations of the Partnership. As a result, this critical experiment in the Employers and the Coalition Unions Labor Management Partnership could well fail.

The employers fully recognize the importance of employee choice, but the National

Labor Relations Act does not provide that employee choice trumps all other considerations.

Instead, the Act mandates a careful balancing of competing interests, particularly those presented

13343081.1 - 4 -

<sup>&</sup>lt;sup>1</sup> The Employers believe that the ALJ made equally erroneous conclusions in connection with the so called "across the board" pay increase and pay for steward training.

1		

in connection with long lasting and carefully crafted provisions in agreements between employers and unions in order to maintain labor peace and productivity. Here following well established decisional law of the Courts and the Board in Section 8(a)(5) cases, the Employers reviewed and attempted to comply with the provisions of the Act in their actions. According to the ALJ's decision the Employers erred in relying on these authorities to guide them in these matters.

# III. Conclusion: The Employers Are Not Filing Exceptions or Cross-Exceptions, and Request Expedited Handling of the Acting General Counsel's Exception.

In any event, the Employers, disappointed as they are by the ALJ's decision and the portents it bears on the Partnership, did not file exceptions, hereby state unequivocally that they will not file and are not filing cross exceptions, and do not seek any review of the ALJ's

13343081.1

	!	
	,	
-		

decision. Instead the Employers respectfully ask that the Board, on an expedited basis, modify the ALJ's decision as requested by the Acting General Counsel and finalize this matter as quickly as possible.

DATED:

February 7, 2011

Respectfully submitted,

MICHAEL LINDSAY

mlindsay@nixonpeabody.com SETH NEULIGHT

NIXON PEABODY LLP

555 West Fifth St., 46th Floor Los Angeles, CA 90013

Telephone: (213) 629-6000 Fax: (213) 629-6001

Attorneys for Southern California Permanente Medical Group and Kaiser

Foundation Hospitals

1	

#### STATEMENT OF SERVICE

CASE NO. Case 21-CA-39296

I hereby certify that a copy of **EMPLOYERS' RESPONSE TO THE ACTING GENERAL COUNSEL'S LIMITED EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION** was submitted for E-Filing to the Executive Secretary of the National Labor Relations Board on February 7, 2011.

The following parties were served with a copy of said document by electronic mail on February 7, 2011.

Robert MacKay Counsel for the Acting General Counsel National Labor Relations Board Region 21 555 West Beech Street, Room 418 San Diego, CA 92101

Telephone: (619) 557-7239 Facsimile: (619) 557-6358

E-mail: Robert.MacKay@nlrb.gov

Lindsay Parker Counsel for the Acting General Counsel National Labor Relations Board Region 21 888 South Figueroa Street, Ninth Floor Los Angeles, CA 90017

Telephone: (213) 894-5224 Facsimile: (213) 894-2778

E-mail: Lindsay.Parker@nlrb.gov

Florice O. Hoffman, Attorney At Law Law Offices of Florice Hoffman 8502 East Chapman Avenue Suite 353 Orange, CA 92869

///

///

	!	
	1	
	1	
•	l	
İ		
•		
!		
! -		
!		
į		

Respectfully submitted,

Marisa Sithi-Amnuai

Dated at Los Angeles, California, this 7<sup>th</sup> day of February, 2011.

	1	
	1	
	!	
	i	
	! 	
	:	
	i	
•	i	
i	i	
į		
	4	
ļ		
•		
1		

E-File Page 1 of 1

eFile



NLRB E-Filing System

CASE INFO UPLOAD DOCUMENTS

**REVIEW** 

CONFIRMATION

Ask A Question

#### Confirmation

You have successfully E-Filed document(s). You will receive an E-mail acknowledgement from this office when it receives your submission. This E-mail will note the official date and time of the receipt of your submission. Please save this E-mail for future reference. Please print this page for your records.

NOTE: This confirms only that the document was filed. It does not constitute acceptance by the NLRB.

Confirmation information

Confirmation Number: 208409

Date Submitted: 2/7/2011 3:17:03 PM (GMT-05:00) Eastern Time (US & Canada)

Office: Office of Executive Secretary

**Case Information** 

Case Number: 21-CA-039296

Case Name: Kaiser Foundation Hospitals; Southern California Permanente

Medical Group; Kaiser Foundation Health Role: Charged Party / Respondent

**Contact Information** 

MICHAEL R. LINDSAY mlindsay@nixonpeabody.com 555 W. 5th Street, 46th Floor Los Angeles, CA 90013 (213)629-6112

Attached E-File(s)

Answering Brief to Exceptions
2011-01-24 NLRB Decision Re Counsel for the acting General Counsel limited

exception to ALJ Decision.pdf

Print

	1	
	ı	
	İ	
	•	
	1	
	!	
	i	
	1	
	ı	
	1	
1		
i		
		*
!		
1		
1		